



August 8, 2002

Ms. Susan C. Rocha
Denton, Navarro & Bernal
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205-3111

OR2002-4364

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166151.

The San Antonio Water System ("SAWS"), which you represent, received a request for the following information: (1) a water contract between SAWS and Oliver ranch; (2) all well logs SAWS has for wells on Oliver Ranch and Sneckner/BSR; and (3) any modeling by SAWS on Oliver Ranch and Sneckner/BSR on well completion and pumping data. You inform us that SAWS will release the contract that is responsive to item number 1 of the request. SAWS claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.110, 552.111, 552.113, and 552.131 of the Government Code, Texas Rules of Evidence 503 and 507, and Texas Rule of Civil Procedure 192.5. SAWS also believes that this request for information implicates the proprietary interests of two private parties, BSR Water Company ("BSR") and Massah Development Corporation ("Massah"). SAWS notified BSR and Massah of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ SAWS also submitted the information that it claims is excepted from disclosure. We have reviewed the submitted information and have considered the parties' arguments.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 at 3 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

We first note that we have received no correspondence from BSR. Consequently, BSR has not demonstrated that any of the submitted information that relates to BSR is proprietary information. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Massah claims that information concerning well logs and modeling relating to water wells on the Oliver Ranch is excepted from disclosure under sections 552.110 and 552.113 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Massah states that it is the owner of water wells located on the Oliver Ranch that are subject to a water supply agreement with SAWS. Massah informs us that prior to drilling these wells, Massah expended substantial sums of money to obtain geological and geophysical information relating to the sources of the water that the Oliver Ranch wells produce. Massah explains that it shared information relating to these wells with SAWS in order to enable SAWS to produce water efficiently and effectively under the parties' agreement. Massah asserts that access to this information would assist a competitor of Massah in producing water from the formation that is the source of the Oliver Ranch wells, thereby causing substantial competitive harm to Massah. Based on these arguments, we conclude that Massah has demonstrated that the submitted well logs that relate to the Oliver Ranch are excepted from disclosure under section 552.110(b) of the Government Code.²

We next note that SAWS has submitted as responsive to the request a report that relates to hydrological evaluation and modeling of the Oliver Ranch wells. This report is subject to section 552.022 of the Government Code. Section 552.022 provides that

²As Massah's claim under section 552.110(b) is dispositive, we need not address the other arguments of SAWS with respect to this information.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted document is a completed report made of, for, or by a governmental body. Therefore, SAWS must release the information contained in this report under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Section 552.110 is considered "other law" for purposes of section 552.022. Based on the arguments submitted to this office by Massah as set forth above, we conclude that Massah has demonstrated that release of a portion of the information contained in the submitted report would cause substantial competitive harm to Massah. Therefore, SAWS must withhold the information we have marked in the submitted report under section 552.110(b). As we are able to make this determination, we need not address SAWS' other arguments for withholding the marked information.³

Lastly, we address SAWS' claim under section 552.103 with regard to the well logs that relate to the BSR water wells. Section 552.103 provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

- (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under

³Upon review of SAWS' arguments to this office, we were unclear as to whether SAWS intended to raise section 552.103 to withhold the report that relates to hydrological evaluation and modeling of the Oliver Ranch wells. Even if SAWS did intend to withhold this report under section 552.103, we note that section 552.103 is a discretionary exception and not "other law" for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.--Dallas 1999, no pet.) (stating that governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (general discussion of discretionary exceptions), 542 at 4 (1990) (stating that statutory predecessor to section 552.103 does not implicate third-party interests and may be waived by governmental body). Therefore, section 552.103 is inapplicable to the submitted report.

Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Under section 552.103, SAWS seeks to withhold portions of well logs that relate to BSR water wells #1, #2, #3, and #4. SAWS asserts that this information relates to anticipated litigation involving an alleged breach of its water supply contract with BSR. In support of its claim under section 552.103, SAWS has submitted correspondence between its attorneys and attorneys representing BSR. Having reviewed this correspondence and considered SAWS' arguments, we find that SAWS has demonstrated that litigation was reasonably anticipated when SAWS received this request for information. We also find that the information that SAWS seeks to withhold under section 552.103 is related to the anticipated litigation. We therefore conclude that SAWS may withhold the information in the BSR well logs at this time under section 552.103.⁴

⁴As we conclude that section 552.103 is applicable, we need not address SAWS' other claims with respect to the BSR well logs.

In reaching this conclusion under section 552.103, we assume that the opposing party in the anticipated litigation has not seen or had access to the information that SAWS seeks to withhold under this exception. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in now withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, SAWS must withhold the well logs that relate to the wells on the Oliver Ranch, as well as the information we have marked in the completed report, under section 552.110(b). SAWS may withhold the well log information that relates to the BSR wells under section 552.103. The remaining information in the completed report must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 166151

Enc: Submitted documents

c: Ms. Sherry L. Mosier
Earl & Brown, P.C.
111 Soledad, Suite 1111
San Antonio, Texas 78205
(w/o enclosures)

BSR Water Company
c/o Sneckner Partners, Ltd.
12255 West Avenue, Suite 5
San Antonio, Texas 78216
(w/o enclosures)

Mr. Randolph C. Marceau
Massah Development Corp.
506 Sandau, Suite 150
San Antonio, Texas 78216
(w/o enclosures)